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April 17, 1996

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

Re: Telecommunications Services Inside Wiring -- CS Docket No. 95-184

Dear Mr. Caton:

Attached please find an original and eight copies of the "Reply Comments of TKR Cable Company," to be filed in the above-referenced proceeding. Pursuant to paragraph 86 of the Notice of Proposed Rulemaking released January 26, 1996 in this proceeding, please deliver a personal copy of these Reply Comments to each Commissioner.

Please contact the undersigned counsel if you have any questions regarding this submission.

Sincerely,

Mark J. Palchick

MJP/mcl
Enclosures

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OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services	)	CS Docket No. 95-184
Inside Wiring	)	
	)	
Customer Premises Equipment	)	
	)	

REPLY COMMENTS OF TKR CABLE COMPANY

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April 17, 1996

Summary of Argument

The raison d'être for the 1996 Telecommunications Act is to promote competition among providers and especially among facilities based competitors. This will not occur if the Commission moves the demarcation point for MDUs or fails to ensure equal access to MDU rights of way.

Many commentors in this proceeding have suggested that the best way to promote competition is to require cable operators to surrender their MDU inside wiring so that other communications providers can provide their own broadband services over that wire. Such suggestions are short-sighted and contrary to congressional intent. Simple exchange of the same broadband wire simply retains the status quo. To promote new, competitive communications services, including a variety of new multichannel video services, the Commission must focus its efforts on permitting MDU residents the right to select from competing providers, each of whom should be required to install its own broadband wire. The Commission, therefore, should not move the cable MDU demarcation point.

To allow competing providers to install MDU inside wiring, the Commission must eliminate the gatekeeper role of MDU owners. If the Commission promotes reasonable and compensated access to compatible easements in MDUs, and allows each MDU subscriber his or her own choice of providers, then a level playing field will be

established for all providers of communications services. The reasons for allowing multiple providers in MDUs is a persuasive as the reasons behind Congress' decision in 1992 to prohibit exclusive franchises.

Moreover, the safety, space and other concerns raised by cable competitors do not comport with the facts, since there is never an instance where appropriate wiring of an MDU cannot be accomplished. If the FCC is to achieve equal access to communications services for all Americans it must break the stranglehold many property owners have on MDU dwellers, who comprise a significant portion of the population. The FCC therefore should require access along compatible easements, with compensation, in MDUs and private developments.

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REPLY COMMENTS OF TKR CABLE COMPANY

TKR Cable Company, by its attorneys, hereby files these Reply Comments in response to comments filed in the above captioned proceeding. In support of its Reply Comments, TKR states as follows.

The raison d'être for the 1996 Telecommunications Act is to promote competition among providers and especially among facilities based competitors.[1] If the Commission appropriates the facilities of existing providers in MDUs and allows MDU owners to continue to restrict access to existing rights of way, the 1996 Telecom Act's goals of competition will be thwarted. If the Commission permits building owners to continue as gatekeepers, the congressional mandate for universal service will not be achieved.

[1] See, e.g., preamble to the 1996 Telecommunications Act, 142 Cong. Rec. H1078 (Jan. 31, 1996) (The Act is "designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans."); see also, Comments of Continental Cable at 6.

Introduction

TKR supports a level playing field for all potential communications providers to multiple dwelling units ("MDUs"), and in fact looks forward to an opportunity to offer MDUs a multitude of services in response to competitive pressures. TKR supports establishment of a framework whereby all communications providers will be permitted to provide varied and competitive services to MDU customers. TKR therefore supports the Commission's efforts to create such a framework.

The proposal to require cable operators to surrender their wiring in MDUs, however, is not the answer. There are not only serious problems with this approach, the approach also impedes rather than advances competition. With technological advances developing rapidly, and with subscriber interest in advanced communications services proceeding apace, MDU customers will desire access to additional, competitive services which will become available from a multitude of service providers. Requiring incumbent providers to surrender the one broadband wire into the homes of MDU customers, just so that another broadband provider can offer the same services already offered by the cable operator, while restricting cable's continued access to the building's easements, simply retains the status quo. In order to cultivate the availability of new, advanced communications services, so that MDU customers can enjoy a selection of services that will suit them, more than one broadband wire must be available to MDU units. To promote new, competitive communications services, including a variety of new multichannel video services, the Commission must focus its efforts on permitting MDU residents the right to select from competing providers.

Moving The Demarcation Point In MDUs Is No Solution

If cable operators are required to surrender their MDU inside wiring, from the street to the existing demarcation point, to a competing multichannel service provider, the following scenario will develop. With only one broadband wire permitted to each MDU unit, individual customers will have available to them only one multichannel service provider. Access to only one broadband service provider provides little if any variety in the communications services offered to an MDU resident. Each MDU customer, in addition, does not really have a say in which of the competing multichannel services will be available to it. Instead, the owner of the building, or tenant association, or some other body, makes that decision for all customers in the building. It does not matter if individual tenants in the building would prefer another provider's service offerings; MDU customers are at the mercy of the MDU owner. The extent to which building owners continue to act as gatekeepers that deny a choice to individual residents is well documented in the NCTA comments at footnote 20 and pages 18-22.

In addition to the lack of individual MDU subscriber choice in the type of multichannel video service, MDU dwellers also will not be allowed access to the variety of other communications services to be developed over the next several years, if each building owner is not required to permit more than one service wire to the individual unit. High-speed data transmission, advanced internet access, interactive shopping services, video on demand, near video on demand, interactive game channels like Sega Channel, telephony service, Local Area Networks (LANS), Wide Area Networks (WANS), dedicated lines, point-to-point service, digital music, and other services will be largely

unavailable to individual customers in MDUs unless more than one wire is permitted to each MDU home. It is this variety of new communications services which offers MDU customers the real choice. Such a choice makes sense, because different communications services will appeal to different MDU customers. Many MDU dwellers, it is expected, will want more than one of these new advanced communications services. However, with only one broadband wire to each unit, these communications services will be unavailable to them, and instead only the one multichannel video provider selected by the MDU owner will be their "choice."

Because MDUs offer a large number of potential customers in a small area, they are likely candidates for the marketing of new communications services. Providers of new services are likely to concentrate on MDUs as a starting point for the development of new services. A policy which results in only one broadband wire to individual MDU units, however, will have a detrimental effect on the development of these new services. If there is only one wire in a MDU, alternative communications service providers will not be able to develop a variety of communications services, but instead will concentrate their efforts on providing different multichannel programming, which many customers currently view as essential. Rather than cultivate a marketplace for advanced communications services, then, a one-wire policy simply promotes the limited competition available through multichannel service offerings

One wire competition is an oxymoron. Adopting a policy which anticipates only one broadband wire in a MDU will also tie the hands of the incumbent cable operator, which is the number one potential competitor to local telephone service to MDUs.

Many operators, including TKR, have invested millions of dollars to upgrade their systems in order to provide future telephone and high speed internet access service to their customers. Taking away the wiring inside the MDU up to the customer's unit makes it much harder for cable companies to offer competing telephone and internet service. This result is, of course, not in the best interests of MDU residents. Furthermore, preventing cable operators from providing telephone service to MDUs frustrates Congress' intent to promote a diversity of communications services, and to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[2]

Multiple Wires Into MDUs Should Be Encouraged

If MDU customers are given access to more than one broadband communications wire, there is a far greater number of communications services which will be available to that subscriber. The result is full competition in the market for present and future communications services. The reason for allowing multiple wires into MDUs is in many ways similar to the reasons the 1992 Cable Act required local franchising authorities to award any reasonable additional franchises. Prior to the 1992 amendments to the Cable Act there was great debate about the legality, constitutionality and merit of exclusive franchises. This debate led to the Preferred case[3] and its progeny. Many franchise authorities and incumbent cable operators argued that multiple franchises would put an unacceptable burden on rights of way. It was argued that multiple operators would

[2] Cable Act, Section 601(4), 47 U.S.C. § 521(4).
[3] City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986).

cause aesthetic and safety problems. Competing operators argued that they were First Amendment speakers and that individual subscribers had a right to select from operators willing to provide service.

These are the very same arguments that are being made about access to the rights of way in MDUs. In fact, to the casual observer, some planned communities look remarkably like franchised cities except that the planned communities do not contain public rights of way.

Provisions of both the Senate and House bills which became the 1992 Cable Act prohibited franchising authorities from unreasonably denying multiple franchises. In the floor debate regarding these provisions, legislators unanimously endorsed these provisions as a means to promote competition in the delivery of video and other communications services.[4] The comments of Representative Fields were particularly succinct: "I think to increase competition in the video marketplace there should be an outlaw of exclusive cable franchise practices."[5] Interestingly, the concept of allowing multiple franchises had been the idea, at least in part, of then-Chairman Sikes of the FCC, who told the Senate Commerce Committee that, "in order to foster competition, Congress should 'eliminate monopoly franchises.'"[6] It was therefore the view of both the Chairman of the FCC and the current Chairman of the House Telecommunications

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[4] See, e.g., Cong. Rec. S413 (Jan. 27, 1992) (Statement of Sen. Danforth); Cong. Rec. S437 (Jan. 27, 1992) (Statement of Sen. Gorton); Cong. Rec. S758 (Jan. 31, 1992) (Statement of Sen. Dodd; Cong. Rec. H6495 (July 23, 1992) (Statement of Rep. Collins); Cong. Rec. H6502 (July 23, 1992) (Statement of Rep. Fields).

[5] Cong. Rec. H6502 (July 23, 1992) (Statement of Rep. Fields).

[6] Cong. Rec. S437 (Jan. 27, 1992) (Statement of Sen. Gorton).

Subcommittee that multiple franchises promote competition by allowing more than one set of transmission wires into the franchise area.

Not only did both the Senate and House bills contain a provision requiring the award of all reasonable franchise proposals, the bill offered as a less-regulatory substitute to the Senate bill also contained such a provision. The substitute bill also would have enhanced competition by "prohibit[ing] unreasonable denials of second franchises and guarantee[ing] that second franchises be given at least as much time to construct their systems as was given the initial franchise recipient."[7]

Representative Collins expressed the competitive benefits of multiple franchises best when she stated:

> The provision of the bill which allows for cities to offer multiple franchises offers a chance for the kind of competitive environment that could resolve some of these problems. I wish that perhaps the legislation had gone a step further and mandated multiple franchises so that customers would have a greater choice of programming and other services, but this is a good first step.[8]

In the Conference Report on S.12, the conferees found that exclusive franchises: "are directly contrary to federal policy and to the purposes of S.12 which is intended to promote competition. Exclusive franchises artificially protect the cable operator from competition."[9] The FCC's twin proposal to move the demarcation point and not to adopt a policy which promotes access to existing rights of way are tantamount to granting one

[7] Cong. Rec. S730 (Jan 31, 1992) (Statement of Sen. Packwood).
[8] Cong. Rec. H6495 (July 23, 1992) (Statement of Rep. Collins).
[9] Cong. Rec., H8328 (Sept. 14, 1992).

provider an exclusive franchise to provide broadband services for sometimes as many as several thousand customers.

If the FCC were now to permit exclusive contracts for the provision of broadband service to MDUs, it would be ignoring its own advice to Congress which led, in part, to the prohibition against exclusive franchises. As a basis for eliminating exclusive franchises the Congress found:

> The Commission recommended that Congress, in order to encourage more robust competition in the local video marketplace, prevent local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service.[10]

If the Commission does not move the demarcation point for MDUs and at the same time promotes reasonable access to compatible easements, it will be following its own advice to Congress on how to promote competition. The Commission cannot now abandon this advice because the 1996 Telecom Act specifically requires the Commission to affirmatively promote competition. Section 706 of the Telecommunications Act in fact requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." New Section 257(a) of the Communications Act requires the Commission to eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services." New Section 257(b) establishes a national policy requiring the Commission to "promote the policies and purposes of this Act favoring diversity of media voices, vigorous

[10] House Report at 46.

economic competition, technological advancement, and promotion of the public interest, convenience and necessity." Finally, Section 7(a) of the Communications Act states that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public." Therefore, competition has been elevated from a federal policy in the 1992 Cable Act to a statutory requirement by the 1996 Telecom Act.

The Commission, therefore must implement rules requiring that MDU owners grant competing service providers access to their property with appropriate compensation and must not move the current demarcation point in MDUs.

As stated by the House Report on H.R. 4103, the precursor to the 1984 Cable Act: "There is simply no point in requiring diverse information sources and services if a large segment of the population -- apartment dwellers -- can be denied access to that information by a landlord who, in effect, functions as an editor for his or her tenants."[11] The Report concluded that "access by the public to as wide a diversity of electronic information sources and services is critical to assuring that the underlying goals of the First Amendment are realized."[12] In 1984, the Committee was concerned that MDU owners were not being permitted to wire the premises, just as competing service providers are now voicing the same concern. The Committee analyzed this problem as follows:

> The Committee notes that it is unfortunate that around the country with increasing frequency citizens are being denied the ability to gain access to cable service because of refusals of landlords or property owners to permit cable operators to wire the

[11] HR Report at 36.
[12] Id. at 79.

> premises. These actions place landlords and property owners in the position of being information gatekeepers, deciding which electronic information will pass into the home and which will not, enabling real estate property interests to be the ultimate electronic editors. The threat these practices pose to the goal of information diversity in the electronic age is very clear and present.[13]

The Comments of many property owners and the Independent Cable Telecommunications Association have misconstrued the nature of the mandatory access cases that have been reviewed by the courts and have likewise misconstrued the Commission's power to require mandatory access to compatible easements. There is a fundamental difference between whether property owners can be forced to provide access, which is permissible, and whether they can be forced to provide access without fair compensation, which is not permissible. There also is a distinction between whether the FCC has the power to condemn property, which the 1984 Act did not allow, and whether the FCC can adopt rules implementing Congress' intent that providers be granted access to compatible easements with compensation, which the 1984 Act did. The FCC certainly has the power to define what a compatible easement is for purposes of Section 621(a)(2) of the Cable Act. Moreover, the FCC surely has the power, short of condemnation, to require, as the New York State Cable Commission did in Loretto[14], mandatory access with compensation. It is unfortunate that Loretto is often cited for the proposition that a government agency may not order access to easements because that was not what the Supreme Court found. A careful reading of the case will show that forced access was permitted provided that the building operator was compensated for

[13] Id. at 79-80.
[14] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

the value of the access and that the case was remanded to set a reasonable level of compensation. In fact, the New York State Cable Commission did set a value for the use of the easements and access was provided. TKR is suggesting that, given the express provisions of the 1984 Cable Act and the 1996 Telecom Act, the FCC should do no more than was done in the aftermath of Loretto -- grant access with compensation. If all providers have equal access to the compatible easements in MDUs, there is no need to move the demarcation point for MDUs and the multi-facility competition required by the 1996 Telecom Act can occur.

Need For A Federal Clarification On Access To Premises

Property owners contend that Commission regulation of right-to-access issues is unnecessary "because the market is already providing building occupants with the services they need."[15] This statement cannot be accurate because otherwise competing providers would not be complaining about inability to gain access to MDUs[16] and there are at least 11 reported cases where access to premises has been an issue.[17] There would also be no need for many states to enact access-to-premises legislation. In order to ensure that the market provides building occupants with the services they need, the Commission should remove gate-keeper control by MDU property owners and require that each subscriber in an MDU be entitled to the services of his or her choice.

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[15] Comments of Building Owners and Managers Association International, et al., at 18.
[16] See, e.g., the following Comments: Pacific Bell at 15; NYNEX at 12; MFS Communications at 4; DirecTV at 13-14; Wireless Cable Association International at 6; Multi-Media Development Corp. at 3.
[17] See, NCTA Comments at 17-20.

Certain property owners have stated that they should be able to retain control over the riser and conduit space in their buildings "so long as they make sufficient capacity available to meet all the needs of the occupants of a building."[18] TKR concurs with this comment, with the clarification that in order to make sufficient capacity available to meet all the needs of the building's occupants, the building owner must permit every occupant to enjoy the communications service provider of its choice.

Property owners also voice concern that mandatory access regulation would jeopardize fire and safety code compliance, jeopardize tenant security, disrupt the activities of tenants, damage the building, and threaten signal quality through electrical interference.[19] This parade of horrors grossly distorts reality and is reminiscent of the parade of horrors cited by AT&T to prevent competition and a free and open market place in the Carterfone[20] and MCI[21] cases. This litany is no more relevant now than it was then. Nothing suggested by TKR would prevent a property owner from ensuring the safety and privacy of MDU occupants, requiring providers to lay wire in an attractive

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[18] Metropolitan Life Insurance Company; Compass Management and Leasing, Inc.; The Galbreath Company; Mar Ray-PCP 1500, Inc.; LCOR, Inc.; Duke Realty Investments, Inc.; National Association of Industrial and Office Properties; Faison; Hagood Management Company; Robins Realty; Brookfield; Sylvan Lawrence Company, Inc. Brookfield Management; VRS Realty Services; The Lockwood Group; Sun Trust Center; Lowe Enterprises Colorado, Inc.; West World Management, Inc.; Tishman Speyer Properties, Inc.; 101 Hudson Leasing Associates; The Real Estate Board of New York, Inc.; John Hancock Mutual Life Insurance Company; Building Owners and Managers Association of Greater Miami, Inc.; Codina Real Estate Management, Inc.; Bankers Trust Company; John Alden Life Insurance Company; The Allen Morris Company; Town & Country Apartments; Brookfield.

[19] Comments of Building Owners and Managers Association International, et al., at 27-35.

[20] Carter v. American Tel. & Tel. Co., 250 F.Supp. 188 (N.D. Tex.), aff'd, 365 F.2d. 486 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967). See also, Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C. 2d 420, recon. denied, 14 F.C.C. 2d 571 (1968); Hush-A-Phone Corp., 22 F.C.C. 112 (1957) (on remand); Phonetele, Inc. V. American Tel. & Tel. Co., 664 F.2d 716 (9th Cir. 1981).

[21] MCI Communications Corp. V. American Tel. & Tel. Co., 462 F. Supp. 1072 (N.D. Ill.), aff'd, 594 F.2d 594 (7th Cir. 1978).

fashion without damaging the property, or ensuring that electrical interference does not occur.

At least one commentor maintains that limitations on space for equipment and risers exist in certain MDU buildings which would prevent more than two or three additional providers from gaining access.[22] It has not been TKR's experience that any space limitations exist at all preventing any number of providers from laying down their own wire in MDUs. The type of MDU wiring which requires hallway molding that Liberty mentions in its Comments encompasses less than 15% of the MDU wiring experienced by TKR. It is rare that MDUs must be wired in this fashion. Where hallway molding is required, the molding is installed specifically for the installer's wiring and may not support additional cables. However, other methods are practical and reasonable. Wall fishing may be performed and TKR has done this in many circumstances. TKR, in order to satisfy building owners, has hired professional contractors to install exterior wiring on high rise buildings. In addition, there is no reason that existing moldings could not be replaced with larger moldings at the competitor's cost or at a shared cost. Extraordinary methods to please building owners can be expensive, but TKR has performed such installations in order to gain the permission of building owners to access the units. It is important to emphasize that there is never an instance where wiring cannot be accomplished. The question is, rather, one of cost vs. benefit. The fact is that the competitor does not want to invest in the wiring, but would rather have the Commission sanction their stealing of an incumbent's wiring. These providers do not care to compete

[22] Comments of RTE Group, Inc. at 4.

fairly, but rather seek to incur absolutely no risk in the investment in wiring. No cable operator could survive such an assault and it should not be permitted under the false label of competition.

In many instances TKR has been compelled by franchise authorities (or by just plain good will) to wire MDUs that would not have been wired based upon a strict return on investment analysis. In some cases, this has been based upon full service to a serving area and required by franchise authorities. To lose the investment in these buildings adds insult to injury. An MDU installation is not always a good investment if you actually have to pay for the wiring. Moving the demarcation points as suggested by Liberty and others and having the Commission sanction the seizure of the cable operator's assets for their benefit, allows a fantastic incremental opportunity for profit. The result requested by Liberty and others will not promote "competition" in the marketplace but would rather provide a government sponsored benefit to one competitor over the other. Such a result is directly in violation of the spirit and letter of the Communications Act.

The plain fact in every MDU building is that if a subscriber wants to receive a service, and if the provider believes it is worth the effort to wire that subscriber's dwelling unit, space will be available, one way or another, for the new provider to wire that unit.

It should also be noted that a great potential for abuse exists if MDU property owners are presented with a variety of service providers who are granted easy and exclusive access to cable's inside wiring. The potential exists that some MDU owners might abuse their power to decide which service provider will be granted access to the

wires. Given exclusive control over which company will be granted access to a potentially large number of customers increases the potential for graft on the part of competing multichannel service providers and MDU owners alike, all of whom recognize the enormous economic potential of exclusive access to MDUs.

The 1996 Telecom Act redefines the concept of universal service and mandates access to the information superhighway for all Americans. If property owners continue to be gatekeepers, any possibility for universal service will be destroyed. The NCTA and other commentors have affirmatively shown how property owners have become gatekeepers to the information superhighway. Individuals have been denied access to information services because of "deals" cut by the owners and managers of the MDUs. There are many more instances of these abuses which have been not reported. These instances include outright theft of an operator's facilities and denial of access where a majority of the unit occupants requested a given operator's service. Therefore, it should be obvious that if the FCC is to achieve equal access for all Americans it must take the steps outlined above to break the stranglehold many property owners have on a significant portion of the population.

Conclusion

The Commission should **not** move the demarcation point for MDUs. If the demarcation point is moved, a significant portion of the population will be denied the benefits of competition promised by the 1996 Telecom Act, access to the information superhighway will be denied to many Americans , and the choice of information provider will be shifted from individual consumers to building owners and managers. To

guarantee that there will be competition without the need for moving the demarcation point, the Commission must affirmatively require compensated access along compatible easements in MDUs and private developments.

Respectfully submitted,

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